137-624

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1283.

EX PARTE: IN THE MATTER OF EUGENE M. CONVERSE, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 15, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1890.

1 *Petition of Eugene M. Converse.*

To the circuit court of the United States for the eastern district of Michigan:

The petition of Eugene M. Converse, of the State of Wisconsin, respectfully shows unto this honorable court that he is detained in custody and is now imprisoned in the Michigan State prison at Jackson, in said eastern district of Michigan, by Hiram F. Hatch, warden of said prison, in violation of the Constitution of the United States, by virtue of a certain warrant of commitment issued out of the circuit court for the county of Calhoun, in said State, as hereinafter set forth.

Your petitioner further shows that he is a citizen of the United States; that he was arrested in the city of Chicago, in the State of Illinois, in October, A. D. 1887, by virtue of a warrant issued by a justice of the peace of the county of Calhoun, in the State of Michigan; that he waived requisition papers and voluntarily came to the said county of Calhoun with the sheriff of said county; that he waived a preliminary examination upon the complaint set forth in said warrant, and that he was bound over to said circuit court and was committed to the jail of said county to await trial; that on the 5th of December, A. D. 1887, he was arraigned in open court upon an information then filed against him, and that upon said arraignment he orally responded to said information in the following words, to wit: "As an attorney-at-law I am guilty of embezzlement of thirty-five hundred dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting
2 the money," and that immediately after uttering the said words he handed to the clerk of said court a slip of paper upon which said words were written to aid said clerk in entering upon the journal of said court the precise language used by your petitioner; that the said clerk, pursuant to the express directions of the presiding judge of said court, filed the said slip of paper in the case and entered upon the journal of said court the following words: "Guilty of embezzlement of money to the amount of three thousand five hundred dollars," as your petitioner's plea in said cause, and excluded the words which stated the professional capacity in which the offense was committed; that upon the said 5th day of December, 1887, and after the said arraignment the prosecuting attorney of said county who was prosecuting the said case was informed, by the express directions of your petitioner, that the language used by your petitioner expressed the facts of the case and as they would appear upon a trial thereof, and that your petitioner would not plead to said information in any other words or manner; that upon the 12th day of December, A. D. 1887, on motion of the said prosecuting attorney, the said judge of said circuit court, without having any personal examination or interview with your petitioner and without conviction by a jury and without any other plea whatever, pronounced judgment against your petitioner and imposed upon him the full penalty for the crime of embezzlement as

an agent, and your petitioner was forthwith removed to the said State prison at Jackson, where he still remains; that your petitioner had no knowledge and was not informed of the incorrect entry of his plea until the 19th day of July, 1888, and that upon the first day of court after your petitioner was informed of such incorrect entry he moved the court, on cause shown, to correct the said entry as of the 5th day of December, 1887, and the court
3 denied said motion; that in October, 1888, he applied to the supreme court of the said State and obtained a mandamus to compel the said circuit judge to correct said journal entry, and that pursuant to the mandate of said mandamus the said journal entry, on the 3d day of December, 1888, was corrected as of the 5th day of December, 1887, by inserting the said language read by your petitioner; that your petitioner took the said record to the supreme court of the State of Michigan on writ of error, and after argument in that court and on the 19th of April, 1889, the judgment of said circuit court was affirmed by a divided court, Justice Campbell dissenting, and that the said warrant, information, slip of paper, entry of plea, judgment, correct plea, warrant of removal, and remittitur appear in the certified copy of the record of the said circuit court hereto annexed as a part of this petition, and to which, for further particularity, reference is made.

Your petitioner further shows that the information charged an offense under section 9151 of Howell's Annotated Statutes of Michigan, which, in brief, provides that any agent who shall embezzle his employer's money which shall come into his possession by virtue of such employment as agent shall be deemed guilty of a statutory larceny and punished accordingly; that said statute provides that where the possession of the money converted was obtained by virtue of a naked agency, uncoupled with an interest, the offense should be a felony and punishable in State prison, not to exceed five years; and that your petitioner has never pleaded guilty to that offense in manner and form as charged; that section 9152 of Howell's Annotated Statutes of said State in short provided that if any attorney-at-law shall collect and receive any money belonging to another in said capacity and not pay it over upon demand he shall be guilty
4 of a misdemeanor and be punishable — in county jail not to exceed one year, or by fine, or both fine and imprisonment, in the discretion of the court; in other words, that where an attorney-at-law in his professional capacity obtains possession of money coupled with a lien or a special property in said money for his fees and fails to pay it over on demand, the offense shall be a misdemeanor; that on the 28th day of July, 1885, the time the money in question is alleged to have been converted, and for five years and upwards prior thereto, your petitioner was an attorney-at-law and solicitor in chancery, duly licensed and admitted to the bar of said State and practicing his profession at Battle Creek, Calhoun county, Michigan, and that the obligations and mortgages upon which the money converted was collected were placed in your petitioner's hands by the owners thereof, as his clients, for collection, and, if necessary, for foreclosure, in the capacity of attorney-at-law and solicitor in

chancery, in the usual course of professional business, and that he collected and received possession of the money converted upon the said obligations and mortgages in such professional capacity and in no other capacity; that at the time of said arraignment he had these facts and the provisions of said section 9152 in mind, and pursuant to the advice of counsel pleaded according to the facts of the case and left the matter with the court to accept such plea or to reject the same and direct a plea of not guilty to be entered, and that your petitioner therefore pleaded guilty of an offense or misdemeanor under the said section 9152, as was clearly expressed in the language he used; and he avers that his said plea was not responsive to the charge made in the information, and is not an admission of the commission of the felony therein charged and is a nullity, and that
5 the said record shows that the circuit court for the county of Calhoun had no authority or constitutional right to render the said judgment against your petitioner, and that he is now deprived of his liberty without due process of law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Your petitioner further shows that due process of law in the State of Michigan is provided for and prescribed by the constitution and statutes of said State in part by the following sections, to wit: "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have assistance of counsel for his defense." (State Constitution, article VI, section 28.)

"No person shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property without due process of law." (State const., article VI, section 32.)

"No person indicted for an offense shall be convicted thereof unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict of a jury accepted and recorded by the court." (2 Howell's Annotated Statutes of Mich., page 2205, sec. 9069.)

"No person who is charged with any offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person." (2 Howell's Annotated Statutes of Mich., page 2205, section 9071.)

6 "When any person shall be arraigned upon an indictment, it shall not be necessary in any case to ask him how he will be tried, but if on being so arraigned he shall refuse to plead or answer or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered, and the proceedings shall be the same as if he had pleaded not guilty to the indictment" (2 Howell's Annotated Statutes of Mich., page 2293, section 9515), and that the law of the land as held by the supreme court of said State required that on a trial for a felony an arraignment upon the in-

formation and a plea thereto are necessary steps to a valid and regular conviction (31 Mich., 471), and that it is incompetent for a defendant to waive his constitutional right of a trial by twelve men, and where one juror was an alien it must be treated as though he had been tried by eleven jurors, and that it is the duty of the court to see that the constitutional rights of a defendant in a criminal case should not be violated, however negligent he may be in raising the objection" (16 Mich., 351); and your petitioner further shows that he did not confess his guilt of the felony of embezzling money which came into his possession as an agent, in open court, as charged in said information, and that he did not admit the truth of the charge made against him in said information by his plea or demurrer, and that he has not been found guilty of the felony charged against him in said information by a verdict of a jury, as the said law of the land required, and that under the law and practice of said State special pleas to the merits were not authorized, and that upon said arraignment your petitioner did not confess the information to be true and the said circuit court did not cause a plea of not guilty to be entered and send the issues to a jury for trial, as due process of law required,

7 and that the said circuit court did not protect your petitioner's constitutional rights in the premises; but, contrary to your petitioner's intentions as expressed and in violation of his said rights, in effect the said court directed a plea of guilty to be entered against your petitioner and then rendered judgment of the utmost penalty of the law against your petitioner, and for these and other reasons your petitioner claims that the said circuit court was unauthorized to render such judgment under which he is now deprived of his liberty as aforesaid.

Your petitioner further shows that the capacity in which possession was obtained of the money converted, whether in a simple agency or as attorney-at-law and solicitor in chancery, is the dividing line and distinguishing feature between the felony defined in said section 9151 and charged in the information and the misdemeanor defined in said section 9152 and admitted in said plea, and that the judgment in this cannot be maintained upon said section 9152, for the reason that the complaint and information did not allege a demand for the payment of the money and a refusal to pay the same, as required to make out an offense under said section, and the said section does not authorize imprisonment in the State prison, and that said plea cannot be a plea of guilty to the offense charged in the information, for the language used excludes the agency contemplated in said information, and that there was and is no legal basis for the judgment, and therefore it is unauthorized and void as rendered without due process of law.

Your petitioner further shows that he has sought relief in the State courts in vain, as aforesaid, and that in July, 1889, he made an application to his honor Justice Harlan, of the United States

Supreme Court, for citation and writ of error from the Su-

8 preme Court of the United States to the supreme court of the State of Michigan, and that the said application was denied for the reason that the said Federal question of due process of law

was not sufficiently raised in the State courts to give jurisdiction under section 709 of the Revised Statutes of the United States, but without prejudice to a new application to the Supreme Court of the United States when in session.

Your petitioner claims that the said circuit court for the county of Calhoun had no legal authority to render the said judgment, and that the said judgment is in violation of his constitutional immunities and rights under the Constitution af the United States, and that the said judgment and warrant of commitment based thereupon are void and his imprisonment thereunder unlawful.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Hiram F. Hatch, may issue in this behalf, so that your petitioner may be forthwith brought before this court to do, submit to, and receive what the law may require.

EUGENE M. CONVERSE.

JOHN C. PATTERSON,
Attorney for Petitioner, Marshall, Mich.

UNITED STATES OF AMERICA, }
Eastern District of Michigan, } *ss:*

EUGENE M. CONVERSE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has heard the same read and knows the contents
9 thereof, and that the statements therein made are true, as he verily believes.

——— ———.

Subscribed and sworn to before me this 7th day of February, 1890.

WILLIAM K. GIBSON,
United States Commissioner for Eastern District of Michigan.

Clerk's Certificate to Record.

STATE OF MICHIGAN, }
County of Calhoun, } *ss:*

I, William J. Gregg, clerk of said county and of the circuit court thereof, do hereby certify the annexed and following is a true and correct copy of warrant and complaint, with return of justice and sheriff endorsed; information, memorandum for plea, entry of plea and arraignment, judgment, denial of motion to correct entry of plea, entry of correction of plea *nunc pro tunc*, warrant for removal, with sheriff's return and warden's receipt endorsed, and remittitur, and being all the files and records, except three affidavits, filed Sept. 8, 1888, in support of special motion to correct entry of plea in the above-entitled cause in said court and now remaining in my office as such clerk.

That I have compared the same with the original thereof, and that it is a true transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at the city of Marshall,
10 in said county, this 30th day of January, A. D. 1890.
WILLIAM J. GREGG, *Clerk.*

Return of Justice.

STATE OF MICHIGAN, } ss:
County of Calhoun, }

To the circuit court of the county of Calhoun:

I, A. H. Briggs, a justice of the peace of the city of Battle Creek, in said county, hereby certify to the said circuit court that by virtue of the warrant hereto annexed, issued upon the complaint on oath and in writing of John E. Dunning, one Eugene M. Converse was brought before me, the said justice, at my office, in said city, on the 25th day of October, A. D. 1887, and the said Eugene M. Converse waived the reading of said complaint, and the said Eugene M. Converse then and there waived an examination before me in regard to the said offence so charged against him in said complaint, and it appearing to me, the said justice, that the offence set forth in said complaint and recited in said warrant had been committed, and that there is probable cause to believe the said Eugene M. Converse to be guilty of the commission thereof, thereupon I required the said Eugene M. Converse to enter into a recognizance, with sufficient sureties, in the sum of two thousand five hundred dollars, for his appearance at the next term of the circuit court to be held in and for said county to answer to said charge; and the said Eugene
11 M. Converse not having offered sufficient bail for his appearance at said court, as required as aforesaid, therefore I committed him to jail to await trial.

A. H. BRIGGS,
Justice of Peace.

Dated November 14th, 1887.

Warrant and Complaint.

STATE OF MICHIGAN, } ss:
County of Calhoun, }

To the sheriff or any constable of said county, Greeting:

Whereas John E. Dunning hath this day made complaint in writing and on oath to me, A. H. Briggs, a justice of the peace of the city of Battle Creek, in said county, that heretofore, to wit, on the 28th day of July, A. D. 1885, at the city of Battle Creek, in the county aforesaid, one Eugene M. Converse, late of said city, being then and there the agent of him, the said John E. Dunning, and Daniel W. Hall, as the executors of the estate of Rice Hall, deceased, and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there and while he was such agent as aforesaid,

receive and take into his possession certain money to a large amount, to wit, to the amount of four thousand ($4,000) dollars, of the property of the said John E. Dunning and Daniel W. Hall as such executors, and which said money came to the possession of the said Eugene M. Converse by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use without the consent of the said John E. Dunning and Daniel W. Hall as such executors as aforesaid, his said employers; and so the said Eugene M. Converse did then and there, in manner and form aforesaid, the said money, the
12 property of said John E. Dunning and Daniel W. Hall as executors as aforesaid, his said employers, from the said John E. Dunning and Daniel W. Hall as such executors as aforesaid feloniously steal, take away, and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the State of Michigan; also that heretofore, to wit, on the 28th day of July, A. D. 1885, at the city of Battle Creek and in the county of Calhoun aforesaid, said Eugene M. Converse four thousand ($4,000) dollars in money, of the value of four thousand ($4,000) dollars, of the goods, chattels, property, and money of John E. Dunning and Daniel W. Hall as the executors of the estate of Rice Hall, deceased, then and there being found, feloniously did steal, take, and carry away, contrary to the form *and* the statute in such case made and provided and against the peace and dignity of the people of the State of Michigan;

And whereas, on examination on oath of the said John E. Dunning by me, the said justice of the peace, it appears to me, the said justice of the peace, that said offense has been committed and there is just cause to suspect the said Eugene M. Converse to have been guilty thereof; therefore, in the name of the people of the State of Michigan, you and each of you are hereby commanded forthwith to arrest the said Eugene M. Converse and bring him before me, the said justice of the peace, to be dealt with according to law.

Given under my hand and seal, at the city of Battle Creek, in said county, on the fifth day of November, A. D. 1886.

A. H. BRIGGS, [SEAL.]
Justice of the Peace.

13 *Sheriff's Return.*

THE PEOPLE
vs.
EUGENE M. CONVERSE. } 4–143 (80).

Warrant for embezzlement.

By virtue of this warrant to me directed I have taken the within-named Eugene M. Converse, whom I have before A. H. Briggs, the justice within named, as I am within commanded.

Dated this 25th day of October, 1887.

JOHN C. BARBER, *Sheriff.*

Bound over to the next term of the circuit court.
Bail (2,500).

Filed Dec. 5, 1887.

LEWIS C. MILLER, *Clerk.*

Information.

STATE OF MICHIGAN, *County of Calhoun,* } ss:

The Circuit Court for the County of Calhoun.

Herbert E. Winsor, prosecuting attorney for the county of Calhoun aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the December term thereof, A. D. 1887, and gives here to understand and be informed that Eugene M. Converse, late of the city of Battle Creek, in the county of Calhoun and State of Michigan, heretofore, to wit, on the twenty-eighth day of July, in the year one thousand eight hundred and eighty-five, at the city of Battle Creek, in said county of Calhoun and State
14 of Michigan, being then and there agent to John E. Dunning and Daniel W. Hall, the executors of the last will and testament of Rice Hall, deceased, and being then and there the agent of them, the said John E. Dunning and Daniel W. Hall, executors of the last will and testament of Rice Hall, deceased, and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there and whilst he was such agent as aforesaid, receive and take into his possession certain moneys to a large amount, to wit, to the amount of four thousand dollars, of the value of four thousand dollars, of the property of the said John E. Dunning and Daniel W. Hall, as such executors, and which said money came to the possession of the said Eugene M. Converse by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use without the consent of the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, *to* his said employers, and that so the said Eugene M. Converse did then and there, in manner and form aforesaid, the said money, the property of the said John E. Dunning and Daniel W. Hall, as executors as aforesaid, his said employers, from the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, feloniously did steal, take, and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the State of Michigan, *contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the State of Michigan.*

H. E. WINSOR,
Prosecuting Attorney for the County of Calhoun.

15 STATE OF MICHIGAN, } ss:
County of Calhoun, }

H. E. WINSOR, being duly sworn, deposeth and says that he knows the contents of the above information and he verily believes the same to be true as therein set forth.

H. E. WINSOR.

Sworn and subscribed before me, at the city of Marshall, this fifth day of December, A. D. 1887.

JAMES H. WOOD,
Notary Public.

Witnesses: John E. Dunning, David W. Hall, F. B. Snyder, F. M. Wadleigh, White Turner, John Peavy, Benjamin Baxter, Moses W. Whitlock, John C. Barber, A. N. Briggs.

[Endorsed:] 4–859. No. 143. Circuit court for the county of Calhoun. The People of the State of Michigan *vs.* Eugene M. Converse. Information for embezzlement. Filed this 5th day of December, A. D. 1887, in the December term. Lewis C. Miller, clerk. H. E. Winsor, prosecuting attorney for the county of Calhoun.

16 *Memorandum of Plea.*

As an attorney at law I am guilty of embezzlement of thirty-five hundred ($3,500.00) dollars, that being the amount collected and received by me less my reasonable fees as such attorney for collecting the money.

EUGENE M. CONVERSE.

(Filings:) Filed Dec. 5, 1887.

CHARLES O. MILLER,
Deputy Clerk.

Plea as Entered.

At a session of the circuit court for the county of Calhoun and State of Michigan held at the court-house, in the city of Marshall, in said county, on Monday, the fifth day of December, A. D. 1887.

Present: Hon. Frank A. Hooker, circuit judge.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
EUGENE M. CONVERSE. } Embezzlement.

Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information being read to him by Herbert E. Winsor, prosecuting attorney, pleaded thereto "guilty of embezzlement of money to the amount of three thousand five hundred dollars."

FRANK A. HOOKER,
Circuit Judge.

Judgment.

At a session of the circuit court for the county of Calhoun, in the State of Michigan, held at the court-house, in the city of
17 Marshall, in said county, on Monday, the 12th day of December, A. D. 1887.

Present: Hon. Frank A. Hooker, circuit judge.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
EUGENE M. CONVERSE.

Eugene M. Converse, the respondent in this cause, having been upon his plea of guilty duly convicted of the crime of embezzlement, as appears by the record thereof, and the said court having examined into the facts of the case and having also privately examined the respondent concerning the circumstances which induced him to plead guilty and having therefrom ascertained that said plea was made freely, with full knowledge of the nature of the accusation and without undue influence, and the respondent thereafter having been, on motion of the prosecuting attorney, brought to the bar of the court for sentence and having then and there been asked by the court if he had anything to say why judgment should not be pronounced against him and alleging no reason to the contrary: therefore it is ordered and adjudged by the said court, now here, that said Eugene M. Converse be confined in the State prison at Jackson, Michigan, at hard labor, for the period of five years from and including this day.

FRANK HOOKER,
Circuit Judge.

Order.

At a session of the circuit court for the county of Calhoun, in the State of Michigan, held at the court-house, in the city of Marshall, in said county, on Tuesday, the eleventh day of September, A. D. 1888.

Present: Hon. Frank A. Hooker, circuit judge.

18 THE PEOPLE OF THE STATE OF MICHIGAN
vs.
EUGENE M. CONVERSE.

In this cause a motion to amend the respondent's plea by inserting the following words, "As an attorney-at-law I am guilty of embezzlement of thirty-five hundred ($3,500.00) dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money," having been duly entered, and after reading and filing affidavits, and after hearing John C. Patterson, of counsel for respondent, in favor of said motion, it is ordered by the court, now here, that said motion be, and the same is hereby, denied.

FRANK A. HOOKER,
Circuit Judge.

Plea as Corrected.

At a session of the circuit court for the county of Calhoun, in the State of Michigan, held at the court-house, in the city of Marshall, in said county, on Monday, the 3d day of December, A. D. 1888.

Present: Hon. Frank A. Hooker, circuit judge.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
EUGENE M. CONVERSE.

Pursuant to an order of the supreme court made on the ninth day of October, eighteen hundred and eighty-eight, and on motion of John C. Patterson, attorney for the defendant for the purpose of this motion, it is ordered that the entry of the arraignment and
19 plea of the said defendant in said cause, entered on the fifth day of December, in the year one thousand eight hundred and eighty-seven, upon journal number twelve of this court, at page 568, be, and the same is hereby, corrected now as of the date last named, so as to read as follows, to wit:

Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information having been read to him by Herbert E. Winsor, prosecuting attorney, pleads thereto in the following words, to wit: "As an attorney-at-law I am guilty of embezzlement of thirty-five hundred dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money."

FRANK A. HOOKER,
Circuit Judge.

Warrant for Removal.

STATE OF MICHIGAN, *County of Calhoun*, } *ss:*

In the name of the people of the State of Michigan, to the sheriff of Calhoun county, greeting:

Whereas Eugene M. Converse has lately, in the circuit court for the county of Calhoun, been duly convicted of the crime of embezzlement and sentenced therefor to imprisonment in the State prison at Jackson, Michigan, at hard labor, for the period of five years from and including the day of his said sentence, as more fully appears by a certified abstract from the minutes of said court of such conviction and sentence, herewith delivered to you and accompanying this warrant, you are therefore commanded to cause the said Eugene M. Converse, without needless delay, to be removed from the
20 jail of the said county of Calhoun to the State prison at Jackson, Michigan.

Witness the Hon. Frank A. Hooker, circuit judge, at the court-house, in the city of Marshall, this 12th day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.]

LOUIS C. MILLER,
Clerk of said Circuit Court.

Sheriff's Return.

STATE OF MICHIGAN, } ss:
County of Calhoun, }

I hereby certify and return that on the 12th day of December, 1887, I did cause the within-named Eugene M. Converse to be removed from the jail of said county to the State prison at Jackson, as I am within commanded.

J. C. BARBER, *Sheriff.*

Dated December 12th, 1887.

State Receipt.

[L. S.] Received the within-named Eugene M. Converse into my custody in this prison.

Dated December 12th, 1887.

H. F. HATCH, *Warden.*

[Endorsed:] (151.) No. 4–143. Circuit court for the county of Calhoun. The People *vs.* Eugene M. Converse. Warrant for removal of prisoner to State prison, Jackson. Filed this 13th day of Dec., 1887. Louis C. Miller, clerk.

21 *Remittitur.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the city of Lansing, on the nineteenth day of April, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Thomas R. Sherwood, chief justice; John W. Champlin, Allen B. Morse, James V. Campbell, Charles D. Long, associate justices.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, }
vs.
EUGENE M. CONVERSE, Defendant and Appellant. }

The record and proceedings in this cause having been removed to this court by a writ of error issued to the circuit court for the county of Calhoun and the same and the matters in error assigned having been seen and inspected and duly considered by the court and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error, therefore it is ordered and adjudged that the judgment of said circuit court for the county of Calhoun be, and the same is hereby, in all things affirmed.

STATE OF MICHIGAN:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the foregoing is a true and correct

copy of an order entered in said court in said cause; that I
22 have compared the same with the original, and that it is a true transcript therefrom and of the whole of said original order.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this 14th day of
[SEAL.] June, in the year of our Lord one thousand eight hundred and eighty-nine.

CHARLES C. HOPKINS, *Clerk.*

Filed this 30th day of January, 1890.

WM. J. GREGG, *Clerk.*

Assignments of Error.

STATE OF MICHIGAN:

In the Supreme Court.

THE PEOPLE OF THE STATE OF MICHIGAN }
vs.
EUGENE M. CONVERSE. }

And now comes the said Eugene M. Converse, defendant and appellant, by John C. Patterson, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in rendering the judgment in said cause upon the plea of the defendant pleaded therein.

Second. There is no sufficient plea in said cause to form a legal basis for the judgment rendered thereon.

Third. The judgment is for a felony and the plea is for a
23 misdemeanor only, and the judgment is broader than the plea, and the penalty imposed is unauthorized by the plea and statute.

Fourth. The judgment against the defendant is for embezzlement in the capacity of agent, and the defendant never pleaded guilty of such crime and he has never been convicted of such crime by a jury.

Fifth. The information does not allege the money converted was the property of any private person or partnership within the statute, but avers it to be the property of the executors of an estate.

And the said defendant, Eugene M. Converse, the appellant and plaintiff in error herein, prays that the judgment aforesaid, for the errors in the record and proceedings aforesaid, may be reversed and held for naught, and that the judgment for his imprisonment in excess of the penalty prescribed for the offense he pleaded to may be held void, and that he may be discharged from imprisonment and custody.

December 6th, 1888.

JOHN C. PATTERSON,
Attorney for Defendant and Appellant.

UNITED STATES OF AMERICA, *Eastern District of Michigan*, } ss:

JOHN C. PATTERSON, of the city of Marshall, in said district, being duly sworn, deposes and says that he was the attorney for the above-named petitioner in the supreme court of the State of Michican in the case mentioned in the foregoing petition, and that the above is a correct and complete copy of the errors assigned upon the record and filed in said supreme court in said case, and that a certified copy of said record is annexed to said petition as a part thereof,
24 and that said assignments of error, in the absence of said petitioner, are verified for and on his behalf and are annexed as supplemental to and as a part of said petition; and further deponent saith not.

JOHN C. PATTERSON.

Subscribed and sworn to before me this 11th day of February, 1890.

WILLIAM D. ADAMS,
U. S. Commissioner.

To Herbert E. Winsor, prosecuting attorney of Calhoun county, Michigan:

Please to take notice that I shall present a petition, of which the foregoing is a copy, to the circuit court of the United States for the eastern district of Michigan, at the United States court-room, in the city of Detroit, in said district, on the 15th day of February, 1890, at the opening of court in the forenoon, or as soon thereafter as the same can be heard, and shall then and there move that the prayer of said petition he granted. Notice of said application is given to you pursuant to the direction of Hon. Henry B. Brown, judge of said court.

Dated Marshall, Mich., Feb. 11th, 1890.

Yours, JOHN C. PATTERSON,
Attorney for Petitioner.

UNITED STATES OF AMERICA, *Eastern District of Michigan*, } ss:

JOHN C. PATTERSON, of the city of Marshall, in said district, being duly sworn, deposes and says that on the 11th day of Febru-
25 ary, 1890, he served a copy of the above petition and notice upon Herbert E. Winsor, the prosecuting attorney of Calhoun county, State of Michigan, by handing the same to him personally at his office, in the city of Marshall; and further deponent saith not.

JOHN C. PATTERSON.

Subscribed and sworn to before me this 11th day of February, 1890.

WILLIAM D. ADAMS,
U. S. Commissioner.

25½ At a session of the circuit court of the United States for the eastern district of Michigan contained and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the tenth day of March, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

In the Matter of the Petition of EUGENE M. CONVERSE for Writ of *Habeas Corpus.*

The petition of the said petitioner having been heretofore argued and submitted, after mature deliberation thereon said petition is by the court now here denied.

26 *Order Allowing Appeal to U. S. Supreme Court.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the fourteenth day of May, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

Ex Parte EUGENE M. CONVERSE. Petition for Writ of *Habeas Corpus.*

The said petitioner, Eugene M. Converse, having duly claimed an appeal from an order made in the above-entitled cause on the tenth day of March, 1890, by this court denying his prayer for a writ of *habeas corpus* and discharge from custody, to the Supreme Court of the United States, on motion of John C. Patterson, attorney for said petitioner, it is ordered that the said appeal be, and the same is hereby, allowed; and it is further ordered that the said petitioner shall perfect his said appeal by causing a copy of the said appeal and of the citation issued thereon to be served upon Hiram F. Hatch, warden of Michigan State prison at Jackson; Hon. Benjamin W. Huston, attorney general of the State of Michigan, and Herbert E. Winsor, prosecuting attorney of Calhoun county, in the State of Michigan, within sixty days from the date of said citation, and that he cause a certified copy of the petition for writ of *habeas corpus*, with the exhibits, affidavits, and notices thereto annexed, filed in this court, and of the order made therein, and of other proceedings had, to be transmitted to the office of the clerk of the Supreme Court of the United States within sixty days from the date of this order.

27 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fifteenth day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

In the Matter of the Petition of EUGENE M. CONVERSE for Writ of *Habeas Corpus.*

Upon the application of Walter S. Harsha, clerk of this court, the time within which to make return to petitioner's claim of appeal to the Supreme Court of the United States is hereby extended ten days.

28 The Circuit Court of the United States for the Eastern District of Michigan.

Ex Parte EUGENE M. CONVERSE, Petitioner for Writ of *Habeas Corpus.*

To the honorable the Supreme Court of the United States:

The appeal of Eugene M. Converse, the above-named petitioner and appellant, respectfully showeth that upon the 15th day of February, A. D. 1890, he filed his petition in the circuit court of the United States for the eastern district of Michigan for a writ of *habeas corpus*, therein alleging that he was detained in custody and was then imprisoned in the Michigan State prison, at Jackson, in said eastern district of Michigan, by Hiram F. Hatch, warden of said prison, in violation of the Constitution of the United States, by virtue of a certain warrant of commitment issued out of the circuit court for the county of Calhoun, in said State of Michigan, upon a certain judgment of conviction which deprived the said petitioner of his liberty without due process of law, contrary to the provisions of the fourteenth amendment to the Constitution of United States, and that the said judgment was void and the imprisonment thereunder unauthorized, and prayed that said petitioner be awarded a writ of *habeas corpus* to enquire into the legality of such im-
29 prisonment, and that he be discharged from custody.

That on the 10th day of March, A. D. 1890, a final order was made and pronounced in said matter, wherein it was in substance adjudged that the writ of *habeas corpus* be refused and the prayer of said petition be denied.

Wherefore this appellant appeals from the said adjudication and final order of the said circuit court of the United States, and respectfully prays that the order of the said circuit court and the petition and proceedings in said matter may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said petition anew, and that the said order of the said circuit court and every part thereof may be reversed and an order made granting the said writ of *habeas corpus* and discharging the said petitioner from custody, pursuant to the prayer of said petition, or such other order as to the said Supreme Court shall seem meet.

Dated May 8th, 1890.

EUGENE M. CONVERSE.

JOHN C. PATTERSON,
Attorney for Appellant and of Counsel, Marshall, Michigan.

Let the appeal in the above matter be allowed.

H. B. BROWN,
District Judge.

30 EASTERN DISTRICT OF MICHIGAN, *ss:*

JOHN C. PATTERSON, of the city of Marshall, in said district, being duly sworn, saith that on the 14th day of May, 1890, he served a correct copy of the above appeal upon Hon. Benjamin W. Huston, attorney general of Michigan, by delivering the same to him personally at the city of Lapeer, in said district; and that on the 19th day of May, 1890, he served a correct copy of the above appeal upon Herbert E. Winsor, prosecuting attorney of Calhoun county, Michigan, by delivering the same to him personally at the city of Marshall, in said district; and that on the 24th day of May, 1890, he served a correct copy of the above appeal upon Hiram F. Hatch, warden of Michigan State prison, by delivering the same to him personally at the city of Jackson, in said district, pursuant to the order of appeal made in said cause; and further deponent saith not.

JOHN C. PATTERSON.

Subscribed and sworn to before me this 28th day of May, A. D. 1890.

WILLIAM D. ADAMS,
U. S. Commissioner.

31 [Endorsed:] 229. The Supreme Court of the United States. *Ex parte* Eugene M. Converse, petitioner for *habeas corpus*. Appeal & proof of service. 31. Filed May 31, 1890. Walter S. Harsha, clerk. John C. Patterson, counsel for petitioner, Marshall, Mich.

32 By Honorable Henry B. Brown, one of the judges of the circuit court of the United States for the eastern district of Michigan, to Hiram F. Hatch, warden of Michigan State prison; Hon. Benjamin W. Huston, attorney general of Michigan, & Herbert E. Winsor, prosecuting attorney of Calhoun Co., Mich.:

Whereas Eugene M. Converse has lately appealed to the Supreme Court of the United States from a final order lately made in the circuit court of the United States for the eastern district of Michigan denying his application for a writ of *habeas corpus* and discharge from imprisonment in the State prison, at Jackson, in said district, and the said Eugene M. Converse has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Detroit, in the eastern district of Michigan, in the sixth circuit, the 14th day of May, in the year of our Lord one thousand eight hundred and ninety.

HENRY B. BROWN,
District Judge.

EASTERN DISTRICT OF MICHIGAN, *ss:*

33 JOHN C. PATTERSON, of the city of Marshall, in said district, being duly sworn, saith that on the 14th day of May, 1890, he served a true copy of the above citation upon the above-named Hon. Benjamin W. Huston, attorney general of Michigan, by delivering the same to him personally at the city of Lapeer, in said district; and that on the 19th day of May, 1890, he served a true copy of the above citation upon the above-named Herbert E. Winsor, prosecuting attorney of Calhoun county, Michigan, by delivering the same to him personally at the city of Marshall, in said district; and that on the 24th day of May, 1890, he served a true copy of the above citation upon the above-named Hiram F. Hatch, warden of Michigan State prison, by delivering the same to him personally at the city of Jackson, in said district, pursuant to the order of *of* appeal heretofore made in said cause; and further deponent saith not.

JOHN C. PATTERSON.

Subscribed and sworn to before me this 28th day of May, A. D. 1890.

WILLIAM D. ADAMS,
U. S. Commissioner.

[Endorsed:] 227. The Supreme Court of the United States. *Ex parte* Eugene M. Converse, petitioner for *habeas corpus*. Citation on appeal and proof of service. Filed May 31, 1890. Walter S. Harsha, clerk. John C. Patterson, counsel for appellant, Marshall, Mich.

34 Circuit Court of the United States, Eastern District of Michigan.

Ex Parte CONVERSE.

MARCH 10, 1890.

Opinion of Judge Brown.

35 This was a petition for a writ of *habeas corpus*, based upon the following facts: Petitioner was arraigned upon an information in the circuit court for the county of Calhoun charging him with embezzlement, he "being then and there agent to John E. Dunning and Daniel W. Hall, the executors of the last will and testament of Rice Hall, deceased." Upon such an arraignment petitioner pleaded to the information in the following language: "As an attorney-at-law I am guilty of embezzlement of $3,500, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money;" thereupon the court, having made the usual private examination of the accused required by statute after a plea of guilty, sentenced him to five years' imprisonment, in pursuance of section 9151, Howell's Statutes, which provides that if any clerk, agent, or servant of any private person * * * shall embezzle * * * without consent of his employer or master any money or other property of another which shall have

come to his possession or shall be under his charge by virtue of such office or employment he shall be deemed by so doing to have committed the crime of larceny. The next succeeding section, 9152, provides that "if any attorney-at-law * * * shall collect or receive in such capacity any money belonging to another and shall neglect or refuse to pay the same to the person entitled thereto within a reasonable time after demand thereof the person so neglecting or refusing shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the
36 county jail not more than one year." Petitioner claims that as the information was framed under section 9151, for the crime of embezzlement by an agent, and he had pleaded guilty to the offense of withholding money which he had collected as attorney-at-law, which was only a misdemeanor under sec. 9152, his sentence was illegal and his imprisonment without due process of law.

Mr. John C. Patterson, for the petitioner; Mr. Hubert E. Winsor, prosecuting attorney for the people.

BROWN, *J:*

Petitioner claims to be held in confinement in violation of the fourteenth amendment to the Constitution of the United States, which declares that no State shall "deprive any person of life, liberty, or property without due process of law," and demands the interposition of this court under Rev. St's, sec. 753, which extends the right of *habeas corpus* to every person held in custody "in violation of the Constitution or of a law or a treaty of the United States." This jurisdiction, which requires of us to pass upon rulings made by State courts in cases not only within their cognizance, but within their exclusive jurisdiction, is one we would gladly disclaim if it were within our power, and so far as it is a matter of discretion we have uniformly refused to exercise it until the petitioner has exhausted his remedy in the State tribunals by an appeal to the Supreme Court. This discretion was declared by the Supreme
37 Court to exist in *Ex parte* Royal, 117 U. S., 249. In this case, however, the petitioner has been refused relief by the supreme court of the State, and we do not feel at liberty to deny him the right to inquire of us whether his imprisonment was imposed by due process of law or by the arbitrary and unauthorized act of the State court.

We suppose it will not be questioned that if a party should be sentenced without a trial upon a plea of not guilty the constitutional provision would be violated. So if he were arraigned for one crime and should plead guilty to another—as, for instance, if he were charged with burglary and should plead guilty to larceny—it would be a plain abuse of power to sentence him either for the burglary to which he did not plead guilty or for the larceny for which he had not been indicted. Upon the other hand, if he were indicted in general words and he pleaded guilty to a particular crime falling within those general words, it would not be illegal to sentence him under the indictment—as, for example, if he were indicted for embezzlement as "an officer of a bank" and he pleaded guilty of

embezzlement as "cashier" of such bank, in such case his description of himself would fall clearly within the general words of the indictment and his plea would only render it more certain that he did commit the offense charged, and the sentence upon such plea would not be illegal, nor would it change the aspect of the case if it were shown that the offense of embezzlement by a cashier was
38 provided for in a separate statute. In other words, it is no defense to an indictment under one statute that the prisoner might also be punished under another.

In this case the prisoner was charged with embezzlement as the "agent" of Dunning and Hall, executors of the last will and testament of Rice Hall, deceased, and pleaded guilty of "embezzlement of $3,500 as an attorney-at-law, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money." Another statute provided a different punishment for the receipt and retention of money collected by an attorney-at-law after demand is made for the same. The question, then, which confronted the court was whether an attorney-at-law is an "agent" within the meaning of the first statute and can be punished as such for embezzlement in failing to pay over moneys collected and received by him in his capacity as attorney-at-law. This question was answered in the affirmative, Mr. Justice Campbell dissenting. Mr. Justice Sherwood, in delivering the opinion of the court, observes: "That the respondent collected the money as attorney is of no consequence. If the act of the respondent complained of contained all the elements of embezzlement, he was guilty of the crime and was properly convicted.

"If an attorney collects money for his client he in so doing acts as the agent of his client as well as his attorney, and — in either case after making the collection he appropriates the money to his own use with the intention of depriving the owner of the same he is guilty of the crime of embezzlement. If this were not so no
39 attorney could be convicted of the embezzlement of his client's money, and this was not the intention of the Legislature in passing the statute creating the crime." (People *vs.* Convers, 42 N. W. Rep., 70.) In other words, the learned court construes the statute as covering an embezzlement by an attorney-at-law. Now, while this opinion may perhaps be against the weight of authority, which seems to hold that the word agent in this statute has no application to auctioneers (Commonwealth *vs.* Stearns, 2 Metcalf, 341), collectors of bills (Commonwealth *vs.* Libbey, 11 Metcalf, 64), to solicitors entrusted by clients with money to invest upon mortgage (Queen *vs.* Newman, 8 Q. B. Div., 706; Regina *vs.* Cooper, L. Rep., 2 C. C. R., 123), or to attorneys-at-law (State *vs.* McLane, 43 Tex., 404), still it is a construction placed by the supreme court of the State upon a statute of such State, and is as binding upon this court as if the opinion were pronounced in an ordinary civil suit. As the prisoner did, in fact, plead guilty to embezzlement as an attorney-at-law, and as the court has held that such offense did fall within the statute, there has been no violation of the constitutional provision and the petition must be denied.

40 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal of Eugene M. Converse to the Supreme Court of the United States from the order of the circuit court of the United States for the eastern district of Michigan denying his petition for a writ of *habeas corpus* that the above and foregoing is a true copy of the petition and order denying the same, with the original claim of appeal and proof of service and citation, together with a true copy of the opinion of Judge Henry B. Brown on denying said petition; that I have compared the said copies with the originals in my office and they are true and correct transcripts therefrom and of the whole thereof.

Seal of the Circuit Court Eastern District of Michigan.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this first day of July, in the year one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: E. Michigan C. C. U. S. No. 1283. *Ex parte:* In the matter of Eugene M. Converse, appellant. Filed September 15, 1890.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1890.

NO. 1283.

Ex Parte: IN THE MATTER OF EUGENE M. CONVERSE, APPELLANT.

Appeal from The Circuit Court of The United States for The Eastern District of Michigan.

BRIEF FOR APPELLANT

—BY—

JOHN C. PATTERSON.

JOHN C. PATTERSON,
Counsel for Appellant.

BENJ. W. HUSTON, ATT'Y-GEN. OF MICHIGAN,
Counsel for Appellee.

Z. H. Denison, Book Printer, Marshall, Michigan.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1283.

Ex Parte: IN THE MATTER OF EUGENE M. CONVERSE, APPELLANT.

Appeal from The Circuit Court of The United States for The Eastern District of Michigan.

Brief for Appellant by John C. Patterson.

I.

STATEMENT.

The appellant filed his petition in the Court below, alleging that he was in the custody of Hiram F. Hatch, Warden of the Michigan State Prison, and was imprisoned contrary to the provisions of the Constitution of the United States, and prayed for a writ of *Habeas Corpus* and release from prison. Pursuant to the directions of the Judge, notice of the application was given to the Prosecuting Attorney of Calhoun county, Michigan, who appeared and resisted the application. The matter was argued and submitted on the petition and record annexed. A final order was made denying the prayer of said petition, and the case is brought into this Court by an appeal from such order.

The petition and the certified copy of the record in the State Court, annexed, establish the following state of facts, viz: That the appellant was arrested in Chicago, Illinois, October 25th, 1887, by virtue of a warrant issued by a Justice of the Peace of Calhoun county, State of Michigan, on the 5th day of November, 1886, charging him with the crime of embezzlement on the 28th day of July, 1885, in the capacity of an *agent;* that the appellant waived requisition papers and voluntarily accompanied the Sheriff to Calhoun county, Mich., and there he waived a preliminary examination and was bound over to the Circuit Court for the county of Calhoun and was committed to jail to await trial; that in Michigan embezzlement by an *agent* is a felony and punishable by five years in State prison, and that embezzlement by an *attorney at law* is a misdemeanor and punishable by one year in jail or by fine; that on the 5th day of December, 1887, the appellant was araigned in the said Circuit Court upon an information charging him with the felony of embezzlement in the capacity of an *agent* and that he pleaded guilty of embezzlement in the capacity of an *attorney at law*—a misdemeanor—in the following words, "*as an attorney at law I am guilty of embezzlement of thirty five hundred dollars that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money;*" that the appellant then and there handed the clerk of said Court a slip of paper with said words thereupon written to enable him to enter said words in the journal entry of said arraignment as his plea; that the presiding Judge directed the clerk to enter said plea upon the journal of said Court in the following words: "*Guilty of embezzlement of money to the amount of three thousand five hundred dollars,*" thereby excluding from the record the words used by appellant to designate the *capacity* in which the embezzlement of the money was admitted, and the words which

distinguish the misdemeanor admitted from the felony charged; that at the time of the commission of the offense charged the appellant was an attorney at law and solicitor in chancery, duly admitted and licensed to practice as such in the Courts of Michigan, and had been practicing his said profession in said county of Calhoun for several years prior thereto, as the said presiding Judge and the Prosecuting Attorney prosecuting said suit well knew; that on the said 5th day of December, 1887, after the said arraignment in open court and plea, the Prosecuting Attorney of said county was informed by said appellant's direction that the language used in said plea stated the capacity in which the offense was committed and the facts that would be established by the evidence upon a trial, and that the appellant would not plead to said information in any other words or manner; that on the 12th day of December, 1887, on motion of the said Prosecuting Attorney, the Judge of said Court, without having any personal examination of the appellant, pronounced judgment against him based upon the said plea as entered upon the journal, and sentenced him to State prison for five years, the extreme penalty for the felony of embezzlement in the capacity of an agent, and that the appellant was forthwith taken to the State prison at Jackson, Michigan, where he now remains. That the appellant upon learning of the incorrect entry of his plea upon the journal, moved the Court to corect this entry by inserting the words used by him, and the Court denied said motion; that he applied to the Supreme Court of the State for a mandamus to compel such correction, and that pursuant to an order of the Supreme Court thus obtained the said Circuit Court afterwards corrected the said journal entry, *nunc pro tunc*, as of the date of the original entry; that appellant then removed the said judgment by writ of error to the Supreme Court of the State for review, alleging that the said plea

was insufficient to support the judgment, and that the Supreme Court affirmed the judgment, Mr. Justice Campbell dissenting. That in July, 1889, appellant applied to Mr. Justice Harlan, of this Court, at chambers, for citation and writ of error to the Supreme Court of Michigan, and that the application was denied for the reason that the federal question was not sufficiently claimed in the State Courts; that some of the leading constitutional, statutory and common law provisions in criminal cases and requirements for the protection of personal liberty—the essential elements of due process of law in our State—are set forth in the petition, from which it appears that the State procedure requires that the criminal acts and intents, the facts constituting the crime charged, can be established only in three ways, viz: They must be confessed by the accused in open court; admitted by him in his plea or demurrer; or, be found by the verdict of a jury; and that no person shall be punished for an offense, unless he has been duly and legally convicted thereof. That the embezzlement of the money in the capacity of an *agent* as charged against the appellant, has never been confessed, admitted, or found against him, as required by such procedure.

The judgment, under which appellant is now imprisoned, follows the information and condemns him for the *felony*, and is based *solely* upon the plea of guilty of *a misdemeanor, another and a lesser grade of crime—a crime not charged in the information.* The appellant has exhausted his remedy in the State courts, and now applies to the United States courts for relief, claiming that the said judgment of the State court was arbitrarily rendered against him and is void, and that he is now deprived of his liberty without due process of law contrary to the provisions of the fourteenth amendment to the Constitution of the United States, and that he is entitled to the relief prayed for under section 753 of the Revised Statutes of the United

States. The Court below held that the United States Courts were bound by the decision of the Supreme Court of the State of Michigan in this case, as a rule of decision, and denied the prayer of the petition.

Whether this judgment was rendered arbitrarily, without due process of law, in violation of the Federal Constitution and therefore void, and whether the United States Courts are bound by the decision of the State Supreme Court in this case, are the principal questions to be considered on this record.

II.

The proceedings of the Circuit Court for the county of Calhoun were unconstitutional, as appears by the record, and said Court had no authority to render the judgment against the appellant and it is void, and the Court below erred in denying the prayer of the petition.

1. The information filed in this case (page 8, of record) charged the felony of embezzlement in the capacity of an agent. The possession of the money having been lawfully obtained by virtue of a *naked agency* uncoupled with any lien or property interest in the money, and was based upon the following section of our statutes, to wit:

§9151. "If any officer, agent, clerk, or servant of any incorporated company, or of any city, township, incorporated town or village, school district, or other public or municipal corporation, or if any clerk, agent or servant of any private persons or of a copartnership, except apprentices and others under the age of sixteen years, shall embezzle, or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any money or other property of another which shall have come to his possession, or shall

be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny."—*2 Howell's Annotated Statutes of Michigan, page 2220, sec. 9151.*

The extreme penalty for the larceny of property over twenty five dollars in value is five years in State prison.—*2 Howell's Annotated Statutes, page 2218, sec. 9140.*

When arraigned on this information in open court, the appellant did not plead "guilty" or "not guilty," in the usual common law formula, but orally responded in these words, viz., "as an attorney at law I am guilty of embezzlement of thirty five hundred dollars, that being the amount collected and received by me less my reasonable fees as such attorney for collecting the money." (Pages 1, 9, and 11, of record.)

This language negatived the intent to plead guilty of the felony charged *in the capacity of an agent*, and expressed in language so clear that it neither requires nor admits of construction, the intent to confess a misdemeanor, of converting money in the capacity of an attorney at law, where the money converted came into his hands rightfully coupled with a special property interest in it in the form of an attorneys' lien, and follows the following section of our statutes, to wit:

§9152. "If an attorney at law, solicitor in chancery, or other person holding himself out to the public to perform the services usually performed by attorneys or solicitors, in the management of causes, and the collection of judgments, decrees or other demands, or any register in chancery, clerk of any court of record, sheriff, constables, justices of the peace, or any other officer, shall collect or receive in such capacity any money belonging to another, and shall neglect or refuse to pay the same to the person entitled thereto within a reasonable time after demand thereof, the person so neglecting or refusing, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding four times the amount of the money so received, or both at the discretion of the court."—*2 Howell's Annotated Statutes, page 2220, sec. 9152.*

a. The words "*as an attorney at law*" and that being the amount "*collected and received*" were quoted from this section of the statute. These and the words "*less my reasonable fees as such attorney for collecting the money,*" demonstrate to a certainty that the appellant intended to plead guilty in the capacity of an attorney at law, and in *no other capacity. Expressio unius est exclusio alterius.*

b. At the time the offense was committed, the appellant was, and, for several years prior thereto, had been an attorney at law duly admitted and licensed under the statutes of Michigan, and had been practicing his said profession at Battle Creek, Calhoun county, Michigan. The owners of the obligations and mortgages collateral thereto, upon which the money converted was collected and received, employed appellant as their attorney at law and solicitor in chancery, to collect such securities and if necessary to foreclose the mortgages in the courts, and that he received these securities and collected and received the money converted, for his clients, in the usual course of his professional business *as an attorney at law, not as an agent.* The appellant, at the time of his arraignment, had these facts and the provisions of section 9152 in mind, and under the advice of counsel, he pleaded according to said facts. (Pages 2 and 3 of record.)

c. It appears from the petition, which is not controverted, and must on this hearing be taken as true, that after the plea was uttered and on the same day the Prosecuting Attorney, prosecuting the case, was informed by the express direction of appellant that the words used by appellant in his arraignment expressed the facts of the case as they would appear upon a trial and that he would not plead to said information in any other words or manner. (Page 1. of record.) In other words, the prosecu-

tion was informed that appellant had not pleaded to the felony charged, but had pleaded guilty of a *misdemeanor, a lesser grade of crime, not charged.* The statutes of Michigan defines felony as follows:

§9430. "The term "felony" when used in this title or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in the State prison." *2 Howell's Annotated Statutes, page 2278, section 9430.*

d. The information did not allege that the appellant was *an attorney or solicitor in chancery,* that the relation of attorney and client existed between him and the owner, *that he collected and received the money in question in such professional capacity, and that he had neglected or refused to pay the same over upon demand,* which was necessary to make out a case under section 9152, above quoted.

4 Mich., 665, People vs. Tryon.
74 Mich., 484, People vs. Converse. Dissenting Opinion of Mr. Justice Campbell.

e. The only course permitted by "the law of the land" was for the Court to direct a plea of not guilty to be entered and send the issue to a jury, or for the prosecutor to discontinue the suit and commence *de novo,* for the misdemeanor the appellant had confessed.

f. In the light of these circumstances, mark the extraordinary and arbitrary steps that follow.

First. The Judge directed the clerk to omit all the words used stating the capacity in which the offense was committed in entering said plea upon the record, and directed the plea to be entered upon the journal of the court in the following words, "Guilty of embezzlement of money to the amount of three thousand five hundred dol-

lars." (Pages 1 and 9, of record.) In *substance and effect*, the Court directed a plea of guilty of the felony charged to be entered against appellant.

Second. After holding the matter under advisement from the 5th to the 12th of December, 1887, on motion of the Prosecuting Attorney, the Court rendered judgment and pronounced the extreme penalty for the felony charged against appellant, based upon this plea as revised and made over by the Judge, and appellant was taken direct from the court room to prison. (Pages 2, 10, and 12, of record.)

Third. At the earliest opportunity after learning of the incorrect entry of his plea, appellant moved the Court on affidavits to correct the journal entry thereof by inserting the words he used, and the Court denied the motion. (Pages 2 and 10, of record.) The correction was afterwards made, *nunc pro tunc*, pursuant to the order of the Supreme Court made in an application for a mandamus. (Pages 2 and 10, of record.)

Fourth. The case was removed to the Supreme Court and the insufficiency of the plea to authorize and sustain the judgment was assigned as error. (Page 13, of record.) The judgment was affirmed (page 12 of record) by a divided court, Mr. Justice Campbell dissenting. The opinion of the majority of the Court is unsupported by principle or authority, and is quite as arbitrary and extraordinary in its nature as the proceedings of the Circuit Court, as we shall hereafter consider.

74 Mich., 478, The People v. Converse. Mr. Justice Campbell filed a dissenting opinion based upon principle and authority, fully sustaining our position, and supported his views by reasons that cannot be answered.

g. The appellant exhausted his remedy in all the State courts, and now applies to the United States court for relief. And the question now before this Court for consideration, is this, is a judgment and conviction of a felony based solely upon a confession of a misdemeanor, not charged, due process of law within the meaning of the fourteenth amendment? To determine this question, we must examine the steps and procedure prescribed by the constitution, statutes, and common law of Michigan in criminal cases. In other words, what constitutes due process of law in Michigan? Several of these provisions are set forth in the petition. (Pages 3 and 4, of record.)

2. The said procedure conflicts with and violates the following mandatory provisions of the constitution, statutes, and common law of Michigan.

a. The State constitution contains the following clauses:

"In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have assistance of counsel for his defense." *Art. VI., section 28.*

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Art. VI., section 32.*

b. The State statutes provide three ways, *and only three ways*, by which the facts of the criminal charge can be determined and whereby a person charged with a criminal offense can be convicted, viz.:

First. By the accused making a "confession of his guilt in open court;"

Second. "By admitting the truth of the charge against him by his plea or demurrer;" and

Third. "By the verdict of a jury accepted and recorded by the court."

Said statute is as follows:

"No person indicted for an offense shall be convicted thereof unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea or demurrer, or by the verdict of a jury accepted and recorded by the court."—*2 Howell's Annotated Statutes of Mich., page 2205, sec. 9069.*

The facts and intents constituting the crime charged in the information against the appellant have *never been confessed, admitted, or found.*

c. The statute of said State prohibits the punishment of any person for crime until he is legally convicted thereof, by the following section:

"No person who is charged with an offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the cause and of the person." *2 Howell's Annotated Statutes of Mich., page 2205, section 9071.*

d. The Court had ample power to make a valid record in this case, by directing a plea of not guilty to be entered and sending the issue to a jury for trial under the following mandatory section of the statute:

"When any person shall be arraigned upon an indictment, it shall not be necessary in any case to ask him how he will be tried, but if on being so arraigned he shall refuse to plead or answer, or *shall not confess the indictment to be true*, the court *shall order* a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleadde not guilty to the indictment."—*2 Howell's Annotated Statutes of Mich., page 2293, section 9518.*

We have shown, that, upon the arraignment, the peti-

tioner did not *confess the indictment (information) to be true*, in manner and form alleged; that he did *not* confess himself to be guilty of the felony of embezzlement as *an agent*. The capacity in which possession of the money converted was obtained, is the distinguishing feature between the numerous crimes of embezzlement under the statutes of Michigan as we shall hereafter more fully consider.

e. An arraignment and plea to the information filed are steps, imperatively required to be entered in the record of a conviction for a criminal offense.

31 Mich., 471, Gregg vs. The People.

An *arraignment upon and a plea to* the charge in the information is *required*, *not* an arraignment upon the charge and a *plea to some other charge*.

f. This record shows that there is no plea to the felony charged in the *information*. The words used by petitioner *were not responsive to the charge*. So far as this information is concerned it is null and void, and a void plea is no plea. If the plea is good the information is bad, and if the information is good the plea is bad. Would it be contended, that on an arraignment upon an information charging the felony of murder, a plea of guilty of assault and battery on the person alleged to have been murdered, would be good and sufficient to convict and hang the party accused? That would be our case, the charge of a felony of high grade, the plea a misdemeanor of low grade, and not charged.

g. The Supreme Court of Michigan have held that in criminal cases it is incompetent for the defendant to waive his constitutional right of trial by twelve men, and says,

"The true theory, we think, is that the people in their political or sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and *other safeguards* for his trial in ac- cordance with the constitution which secures his rights." * * * * * * "*It is the duty* of the courts *to see* that the constitutional rights of a defendant in a criminal case *shall not be violated*, however negligent he may be in raising the objection.

16 Mich., 351, 357 8, Hill vs. People.
53 Mich., 48, 58, People vs. Hardy.

h. Does not the record show that the State Circuit Court has not discharged its duty towards the appellant in carrying into effect these *safeguards*, and in enforcing his constitutional right? Has not the Court deprived him of his right to a jury trial and has it not in effect directed a plea of guilty to be entered against him, and is he not now deprived of his liberty without due process of law contrary to the provisions of the statute and federal constitution? Have not the state Courts ignored and disregarded the safeguards and procedure required to make up the "law of the land" and to protect personal rights? Have not the State Courts proceeded in an *arbitrary and in an extraordinary manner* in the premises and contrary to the general law and procedure applicable, "which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

i. The appellant, when arrested, waived requisition pa-

pers and voluntarily accompanied the sheriff to Michigan and waived the preliminary examination, and when arraigned confessed the crime he had actually committed. He informed the Prosecuting Attorney that he had pleaded according to the facts, and it is evident that he was willing to suffer for the crime he had actually committed, and make as little expense as possible; but he is not willing to suffer for a crime he has not committed and for which he has not been found guilty by the required procedure. This man committed a great wrong both against his clients and against society in converting this money, but *society, by this arbitrary and unauthorized conviction and imprisonment* has inflicted upon him a far greater wrong.

3. The *capacity* of the employment in which the possession of the money was obtained, whether *as agent* or as *attorney at law*, is the distinguishing feature between the *felony charged* and the *misdemeanor admitted* between the crimes defined in sections 9151 and 9152 above quoted.

a. The word "*agent*" as used in the information cannot be construed to mean or include "attorney at law" as used in said plea, nor as used in said sections 9151 and 9152 without violating the *legislative intent*. There is a wide difference between an agent and an attorney at law—a married woman, an infant, an alien, or any person of sound mind, whether under disability or not, can become an agent. Not so with an attorney at law; he is an officer of the court, and of the state and must be a citizen twenty-one years of age, and of approved learning and character, and commissioned and qualified by authority of law. An attorney at law has privileges and liabilities different from those of an agent. The following are the statutory pro-

visions for the admission of attorneys in Michigan, defining their powers and liabilities:

§7173. "No person shall practice as an attorney or counsellor at law except in the county court, or as a solicitor or counsellor in chancery within this State, unless he shall be approved by the Court for his good character and learning and duly admitted pursuant to the provisions of this chapter."

§ 7174. "The Supreme Court may grant to any citizen of this State, of good moral character and of the age of twenty-one years, a license to practice as an attorney and counsellor at law, upon an examination at a stated term of said Court, in the presence of the justices thereof, when satisfied that the applicant possesses sufficient legal learning and ability to discharge the duties of such office."

§ 7175. "Every person admitted to practice as an attorney and counsellor at law shall take the constitutional oath of office in open court and subscribe the same in a roll or book to be kept by the clerk for that purpose."

§ 7176. "Every person licensed to practice as an attorney and counsellor in the Supreme Court shall be authorized to practice in every court of law in this State."

§ 7177. "The Supreme Court and the several Circuit Courts, may license an attorney and counsellor at law of this State, to practice as solicitor and counsellor in chancery, under such rules and regulations as they shall prescribe."

§ 7178. "Attorneys, solicitors and counsellors may be removed or suspended by the several courts in which they shall be authorized to practice." *2 Howell's Annotated Statutes of Mich.*, page 1826, sections 7173 to 7178 inclusive.

An agent is made by *private* contract, expressed or implied, an attorney at law is a *public* trust or office, made by public authority and appointment.

b. The ~~difference and~~ construction contended for has been decided by the Supreme Court of Michigan in a case, which if not a rule of decision binding this Court, ~~which~~ must have great weight. Under the State Constitution a suitor

can appear in court in person, by attorney or agent under the following clause, viz.:

"Any suitor in any court of this State shall have the right to prosecute or defend his suit either in his own proper person or by an attorney or agent of his choice." *Art. VI., Section 24.*

A defendant in a suit pending in the Superior Court of Grand Rapids appeared by an "agent," not a licensed attorney of the Courts, and claimed the right so to appear under this clause of the constitution. Motion was made to the Supreme Court for mandamus to compel the Superior Court to strike out such appearance as unauthorized. The Supreme Court of the State in a carefully considered opinion held that the word "agent" as used in this clause of the Constitution was not synonymous with "attorney" as used in the statutes and rules of practice; that an agent was not an attorney and that a party could not appear in a court of record by an *agent* who was not an attorney duly licensed and qualified to practice in the Courts, and granted the mandamus.

43 Mich., 289, Cobb, Relator, vs. Judge of Superior Court of Grand Rapids.

This decision in construing this clause of the State Constitution defines both the word "agent" and the word "attorney" as used in that instrument. Sections 9151 and 9152 are statutes under this fundamental law of the State, and the words "agent" and "attorney" as used in those sections must conform to the meaning in the constitution. A construction of these local statutes has been given by the highest Court in the state, and is a rule of decision, binding upon this Court.

c. The difference between the offense charged and the offense admitted—between said section 9151 and 9152—is founded upon the different rights of the persons in pos-

session of the property converted. Under section 9151 the servant, clerk or agent has simply a naked possession, *uncoupled with any* interest; while under section 9152 the attorney at law has possession coupled with a lien for fees and disbursements, a special property in the money converted. In the former case he owns no part of the property; in the latter case he owns a part of it, and converts his own property in part.

d. This distinction has been defined in Massachusetts in the following words: "In the case of a domestic servant, and to some extent in the case of special agency, the rights of property and the possession continues in the principal, and a disposal of the property would be a violation of the trust and an act of embezzlement. But cases of commission merchants, auctioneers, and attorneys, authorized to collect demands stand upon a different footing, and a failure to pay over the balance to their employers upon these collections, will not, under the ordinary circumstances attending such agency subject them to the heavy penalties consequent upon a conviction of the crime of embezzlement."

11 Metcalf, 64, Commonwealth vs. Libby.

The following cases sustain the same doctrine:

2 Metcalf, 344, Commonwealth vs. Stearns.
43 Texas, 404, State vs. McLane.
8 Q. B. Div., 706, Queen vs. Newman.
2 C. C. R., 123, Regina vs. Coopers.

And the authorities cited and the reasons contained in the learned dissenting opinion of Mr. Justice Campbell in this case.

74 Mich., 482, People vs. Converse.

e. The distinction between "agent" and "attorney at law" as used in these pleadings must be maintained or the

greatest confusion will be the result in our state, for we have at least twenty other statutory crimes of embezzlement, besides those defined in the two sections above named, with various penalties ranging from a nominal fine to imprisonment in State prison for twenty years. In all these offences the fraudulent conversion of money or property, coming into the possession of the accused rightfully and without a trespass, *in the capacity of some office or employment is the gist* of the crime. The *capacity* of the employment *in which possession of the property converted* is acquired is the dividing line and the *sole distinguishing feature* between these several offenses. A glance at the following named sections of Howell's Annotated Statutes of Michigan will demonstrate the truth of this proposition, to wit: Embezzlement by an officer or employee of an incorporated State bank may be punished by ten years in State prison (Sec. 9148); by a State or County treasurer fourteen years (Sec. 9141); by an officer or employee of State, five years (Sec. 9150); by warehouseman of receipted property, five years (Sec. 9159; by officer of Savings bank, twenty years (Sec. 3201); by officer of Loaning and Investment Societies, five years (Sec. 3278); embezzlement by insurance agents, five years (Sec. 9190); by bankers, brokers or collecting agents, one year in jail or fine (Sec. 9192); by officer or agent of railroads, five years (Sec. 9204); and other statutes of like nature.

If an "attorney at law" can be made "agent" within the meaning of the pleadings and statutes under consideration by construction in this case, and thereby wipe out the distinction made by the legislature, it can be done in all cases.

If "attorney at law" can be construed to mean "agent" and thereby convert a misdemeanor into a felony, it will follow that an "agent" can be construed to mean an officer of a bank and given ten years in State prison, and an of-

ficer of a bank construed to mean a County or State treasurer and given fourteen years, and a County or State treasurer can be construed to mean officer of a Savings bank and given twenty years. The lowest grade of embezzlement with mere nominal penalties could be converted into the highest grade of felony with the most severe penalty. Such a construction would not only disregard the legislative intent as expressed and ignore the meaning of the language used, but would usurp legislative powers and create statutory offenses where none ever existed. If such arbitrary powers exist and can be enforced as "due process of law" where can we look for the security of the citizen.

f. These are criminal pleadings and these are criminal statutes and in derogation of the common law and must have a strict construction.

g. The legislature of Michigan have given a legislative construction of sections 9151 and 9152 recognizing the distinction contended for by consolidating the provisions of the two sections into an additional section to the chapter on crimes. *The Court will please bear in mind that this additional section did not take effect until after the crime in question was committed,* viz., *three months after the adjournment of the legislature.* The following is the additional section:

§ 9176a. "If any officer, agent, clerk or servant of any incorporated company, foreign or domestic, or of any clerk, agent, or servant of any private persons, or of any co-partnership, except apprentices and other persons under the age of sixteen years, or if any attorney at law, collector, or other person who in any manner receives or collects money or other property for the use of and belonging to another embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use without the consent of his employer, master, or owner of the money or goods collected or received, any money or property of another, or

which is partly the property of another, and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person, which has come to his possession or under his care in any manner whatsoever, he shall be deemed to have committed larceny, and, in a prosecution for such crime, it shall be no defense that such officer, agent, clerk, servant, attorney at law, or other person, was entitled to a commission out of such money or property as commission for collecting or receiving the same for and on behalf of the owner thereof. *Provided*, That it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector or other person, to retain his reasonable collection fee on the collection, or any other valid interest he may have in such money or property." *Session Laws of Mich., for 1885, page 112.*

In the light of this section, can there be any doubt as to the legislative intent and how the legislature understood sections 9151 and 9152. Does not this additional section added to the criminal code of the State, after the offense in question was committed, demonstrate to a certainty that our construction is the true one, that the crime charged and the crime admitted are separate and distinct, and the plea was not responsive to the charge and is null and void, and that the court had no legal authority to render the judgment against appellant and that his imprisonment is in violation of his constitutional immunity guaranteed to him in the fourteenth amendment.

We must construe the information and the plea, *in the light of the statute*. The question here involved relate to the pleadings and not to the statute, only so far as they throw light on the pleading. This Court will consider the pleadings a general question of jurisprudence to determine whether the judgment is void within the meaning of the federal constitution.

h. Logically, sec. 9151 is the major premise. The charge made in the information is the minor premise. The charge therein made is not confessed, admitted or found, nor ju-

dicially established in any manner. The charge as minor premise is *assumed* and the judgment is rendered on that assumption, and the appellant is now in prison under that judgment. Is this due process of law? If this is due process of law what has become of the presumption of innocence, what has become of the right of a trial by jury, and numerous other safeguards of personal liberty.

The information charges the appellant with certain criminal acts and intents committed in a certain capacity which constitutes a certain felony. The criminal acts and intents and capacity have never been judicially determined in any manner. Yet a judgment has been rendered and a commitment thereupon issued. A judgment in a criminal case without a judicial determination of the facts charged, is a monstrosity in American jurisprudence. An imprisonment under such a judgment cannot be imposed without violating and subverting the constitutional, statutory, and common law safeguards of a citizen.

III.

This Court must decide for *itself* whether the said judgment of conviction is void, and whether the appellant is in custody in violation of the following clause of the fourteenth amendment of the Constitution of the United States, to wit: "No State shall make or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law." This is a federal question to be decided by the federal courts, and such courts are not

bound by the decision of the Supreme Court of the State of Michigan in this case and the Court below erred in so holding.

135 U. S., 1, In Re Neagle.

1. The learned Judge of the court below, based his decision denying the prayer of the petition solely upon the ground that the United States courts were bound by the decision of the State Supreme Court (page 20 of record). This requires us to consider both the decision and its effect.

a. The same record that was before the Supreme Court of Michigan is annexed to the petition as a part thereof in this Court. The assignment of errors in that Court are also annexed to said petition (page 13 of record). The fifth assignment of error was abandoned and was not considered on the argument or in the decision. The other errors assigned upon said record related to the sufficiency of the plea.

The questions involved in that case and decided by the Court were *questions of pleadings*, not questions of local statutory construction. The majority opinion of the Court refers to the information and plea and then decides the plea is sufficient. *The case is decided upon the pleadings, and not upon the statute.* No doubt the pleadings were considered *in the light of the statute* as we have considered them here. We must distinguish between decision and dicta for dicta binds no one.

74 Mich., 478, People vs. Converse.

b. If the case was determined as a matter of pleadings, it is a question of general jurisprudence, not a question of

local construction that is a rule of decision in the federal courts.

c. The prevailing opinion after stating the case in brief says, The appellant is a lawyer and knew the meaning of the word "embezzlement." No doubt he understood he was pleading guilty of the felony charged. [*Why did he not say "guilty"? Why did he exclude that idea by the words he used? Why did he inform the Prosecuting Attorney he had pleaded according to the facts, and as they would appear on trial?*] This is verified by the private examination of the Judge as required by the statute, [*This private examination, as well as the plea and the determination of criminal acts and capacities was omitted; page 1, of record.*] and then holds that the *capacity* is of no consequence. If his acts contained the elements of embezzlement, he is guilty and properly convicted. [*The Court here assumes these criminal acts, which have not been put in issue, confessed, admitted, or found, as the law imperatively requires.*] An attorney is an agent for his client as well as his attorney, and in either case if he intentionally converts money he is guilty of embezzlement, [*Under what statute?*] otherwise an attorney could not be convicted of embezzlement as an agent. [*The legislature as we have seen has provided for that event.*] The conviction was warranted by the plea and the judgment is affirmed.

The *substance* and *effect* of this decision aside from its statements and arguments, can fairly be stated in this sentence, "*The distinctions made by the law are of no consequence, the plea is good and judgment is affirmed.*" This judicial proclamation is based upon *no* legal principle *nor* sustained by *any* authority. It cites no statute, and gives no intimation, *per se*, that the statute was ever examined. *It gives no construction of the statutes whatever.* Even if

this was a question upon which the decision of the highest court of the State would be a rule of decision, the State court *has not* given any construction of the statute and this Court is free to decide it as a new question for itself.

107 U. S., 33, Burgess vs. Seligman.
92 U. S., 501, Town of Vernon vs. Murdock.

d. The only construction of these statutes attempted in the case was made by Mr. Justice Campbell in his dissenting opinion, which fully sustains our position. He analyzes sections 9151 and 9152, gives the reasons for the distinctions and sustains his views by principles, authorities and reasons that cannot be answered. This dissenting opinion supported by precedents as it is and announced by that great jurist, its author, *per se*, outweighs as an authority the opinion of the majority of the Court. It gives the history and philosophy of the two statutes, and I refer to it both for its authority and its reasons. In the language of this dissenting opinion, "The legislation of this State, civil and criminal, has kept separate professional misconduct and violations of duty as agents, and there are readily ascertainable reasons for so doing in the differences which may honestly arise on questions of compensation and accounting. It is never safe to let considerations of hardship or demerit of a single case destroy distinctions which are expressed in the law. It is an easy matter to amend statutes but it is not the business of the courts to change the legislative meaning. The act confessed by respondent was not a felony, and the information was for a felony. The plea was not a plea of guilty under the information and when the prisoner failed to plead to what he was charged with, he should have been put upon his trial. Our practice does not allow special pleas on the merits. The only special pleas in bar relate to former proceedings. A plea of guilty outside of the rec-

ord is no plea and cannot support a conviction. Its peculiar form should have drawn attention to it. The judgment should be reversed and the prisoner discharged from State prison."

74 Mich., 485, People vs. Converse.

c. It is not claimed that the State Supreme Court decided the federal question of due process of law.

2. The United States statutes providing that the laws of the several States shall be regarded as rules of decisions in trials at common law in the Courts of the United States expressly except all federal questions.

Revised Statutes of the United States, Sec. 721.

3. This statute does not apply to criminal cases. This Court has said, "The language of the statute limits its application to cases at law, there is, therefore, nothing in the section which requires it in proceedings in equity or admiralty, nor is it applicable to *criminal offenses against the United States* (see U. S. vs. Reed, 12 Howard, 361) or where the *constitution, treaties* or *statutes* of the United States requires other rules of decisions."

125 U. S., 555,582, Burton vs. Charleston R. R. Co.
12 Howard, 561, U. S. vs. Reed.

a. It is true, this was not a criminal offense against the United States, but the principle is the same, an immunity of a citizen under the federal constitution has been violated and he seeks redress in the federal courts.

4. In determining whether a State law impairs the obligation of a contract, this Court has said, "We decide for ourselves, independently of the decision of the State courts, whether there is a contract and whether its obligation is impaired, and if the decision of the question as to the existence of the alleged contract requires a construction of a State constitution or laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well established doctrine of this Court."

16 Howard, 369,391, State Bank of Ohio vs Knapp.
109 U. S., 244, 250, L. & N. R. R. Co. vs. Palmes.
101 U. S., 791, Wright vs. Nagle.
1 Black, 436, Jefferson Bank vs. Shelly.

a. So in determining whether appellant is deprived of his liberty without due process of law, this Court will decide for itself, independent of any supposed decision of the State Court. It will construe the State constitution, statutes and the common law procedure, if need be, to determine that question.

b. No rule of property is involved in this case.

5. In another case this Court has said, "In case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws or treaties of the United States. The question whether his imprisonment is illegal under the constitution and laws of the State is not open to us, and although the question might have been

considered in the Circuit Court in the application made to it, and by this Court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the State Court upon the points involved in the inquiry. That however does not preclude this Court from putting upon the ordinances of the supervisors of the city and county of San Francisco an independent construction for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States, and necessarily involve many of the ordinances which for that purpose we are required to ascertain and adjudge."

118 U. S. 356, *365-6*, Yeck Wo vs. Hopkins, Sheriff (error).
118 U. S. 356, *365-6*, Wo Lee vs. Hopkins, Sheriff (appeal).

6. "The Courts of the United States are not bound by the decisions of the State Courts upon questions of general commercial law" (100 U. S. 339, Oats vs. National Bank). They are not bound by decisions of State Courts on questions of general jurisprudence, (18 Wallace, 546, Boyce vs. Tobb). Decisions of the highest State courts holding railroad aid bonds void will not be followed by this Court where such decisions are not satisfactory to the minds of the Judges here—such negotiable bonds issued under an act of the legislature involve questions relating to commercial securities and whether under the constitution of the State such securities are valid or void belongs to the domain of general jurisprudence. (19 Wallace, 666, Township of Pine Grove vs. Talcott). This Court will "never immolate truth, justice or law, because a State tribunal has erected the altar and decreed the sacrifice." (11 Wallace, 175, *206*, Gilpeke vs. City of Dubuque). The United States Courts adopt, as rules for their judgments,

decisions of State courts only on local questions which are peculiar to a State or adjudications upon the meaning of the constitution or statutes of a State. On these matters they are not bound by decisions not necessary for the decision of the case. They are bound by decision and not dicta. (16 Howard, 275, Carroll vs. Lessee of Carroll, et al. 92 U. S., 501, Town of Vernon vs. Murdock). The decision of the highest State court construing a deed by the rule of the common law is not binding on this Court. (4 Howard, 353, Foxcroft vs. Mallett). Again to use the language of this Court, "Where private rights are to be determined by the application of common law rules alone, although entertaining for the State courts the highest respect, does not feel bound by their decision." (2 Black, 428, Chicago vs. Robbins).

a. A construction of the statutes was not necessary for the decision of this case in the State Supreme Court and that the statute, in fact, was not construed by that court in this case, as we have shown. The only question involved and decided related to the plea, a question of general law and not of a local statute. If this Court is not bound by the construction of a deed by a State court, why should it be bound by the construction of a plea? Are not the rights of the appellant to be determined in this case by the application of common law rules.

7. All federal questions must be decided by the Courts of the United States for themselves.

14 Wallace, 661, 668, Delmar vs. Insurance Co.
17 Wallace, 648, 651, Walker vs. Harbor Commissioner.
118 U. S. 356, Yeck Wo vs. Hopkins, sheriff.

a. This must be the rule from the very nature of the sys-

tem, even if the federal question grows out of a local statute or law. Federal questions are excepted from the statutes of the United States, prescribing the rules of decisions in trials at common law, and they are excepted in all the decisions of this Court. This must be the law, or the constitution and the laws of the United States cannot be the supreme law of the land and this Court must be powerless to enforce the rights guaranteed to the citizens of the United States and the exercise of its appellant jurisdiction upon writ of error to State courts would be a solemn mockery.

b. A federal question as broad as the nation itself is involved in the case at bar—a question that involves the liberty of every American citizen and this Court must decide it for itself.

c. We should not have deemed it necessary to have discussed this question, at length, had not the Court below rendered an adverse opinion upon this point.

IV.

If the State court did not have jurisdiction to render the judgment in question because the proceedings were unconstitutional, such judgment is void and it may be questioned collaterally and the appellant discharged on *Habeas Corpus.*

131 U. S., 176, Hans Neilsen, petitioner.
100 U. S., 376, Ex Parte Seabold.
18 Wallace, 163, Ex Parte Lange.
Church on Habeas Corpus, Sections 78, 80, 228, 245, 351, 362, 370–1, 368 to 373.

1. The Court may have jurisdiction over the subject matter and over the person, and yet have no authority to render the judgment in the case. If the Court had no authority to render the judgment it is void and relief will be given.

Church on Habeas Corpus, Sections 370 and 371 and cases.
Hans Neilson, petitioner, supra.

2. "A judgment may be erroneous and not void, and it may be erroneous because it is void." When void relief will be given on Habeas Corpus.

Church on Habeas Corpus, Sec. 372.
18 Wallace, 175, Ex Parte Lange.

3. "If the defect appears in the indictment or any where else in the record (of which the judgment is only a part) it is sufficient."

Hans Neilsen, petitioner, supra.

a. In Hans Neilsen, petitioner, the defect as in the case at bar, appeared in the plea. In Ex Parte Snow, 120 U. S., 274, the defect appeared in the judgment. In Ex Parte Wilson, 114 U. S., 417, the defect appeared in the information and record. And in Ex Parte Bain, —U. S., —the defect appeared in the indictment and order of the court.

b. In this case the absence of a plea and a judicial determination of the facts alleged in the information, appear in the record. The non-compliance with the usual requirements, the non-performance of the essential acts to make due process of law clearly appear in the record.

c. In the language of the Court "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case it is true the Court has no authority to take cognizance of the case, but in the other it has no authority to render the judgment against the defendant."

131 U. S., 183, Hans Neilsen, petitioner.

Is not the appellant's conviction and punishment unconstitutional?

d. Should it be urged that the case discloses a mere error of law and cannot be reviewed here, we, in the language of this Court, say that appellant "was protected by a constitutional provision securing to him a constitutional right. It was not a case of mere error in law, but a case of denying to him a constitutional right, and when such a case appears on the record the party is entitled to be discharged from imprisonment. * * * A party is entitled to a Habeas Corpus not merely when the Court is without jurisdiction in the case, but where it has no constitutional authority or power to condemn the prisoner. * * * If the commitment be against law, or being made by one who had no jurisdiction of the cause, or for matters for which by law a man ought not to be punished, the Courts are to discharge. * * * And why should not a rule prevail, *in favorem libertatas.* If we have seemed to hold the contrary in any case it has been from inadvertence."

131 U. S., 176, Hans Neilsen, petitioner, and cases cited.
Also 118 U. S., 356, Wo Lee vs. Hopkins, sheriff.

e. The State court had no authority to render the judgment of conviction against the appellant—a constitutional

right was denied him—a constitutional immunity was violated, his imprisonment is unlawful and he is entitled to a discharge on this writ.

V.

The appellant did not intend to confess his guilt of the felony charged; his plea was not responsive to said charge and is void.

1. There is no law to compel a person accused of crime to plead to such charge. He has the option to plead or stand mute. If he does not confess his guilt or stands mute upon arraignment, the Court is authorized to direct a plea of not guilty to be entered. If the accused has the right to plead or not, as he chooses, it follows that he has a right to plead to such parts of the charge or use such language as he may elect. That the appellant did not *intend* to confess the felony charged, is *established beyond all question* by the clear and concise words he used. He informed the Prosecuting Attorney on the same day of the arraignment *that he had pleaded according to the facts of the case, and as they would appear from the evidence on a trial, and for that reason*, he would plead in no other words or manner. The petition shows that he had section 9152 in mind at the time he pleaded, and that, *pursuant to the advice of counsel*, he pleaded guilty of a misdemeanor under said section 9152 *according to the facts of the case*. It is evident that he had conferred with his counsel concerning the facts *charged* and the *facts as they existed*; concerning the felony charged and the misdemeanor committed; concerning sections 9151 and 9152; he

had had a copy of the information and the statutes before him days before the arraignment, himself, a lawyer, accustomed to examine both law and facts, after consideration he stated a summary of the facts as they would appear from the evidence on a trial as his plea.

a. With an intent not to confess the felony charged *so clearly and unequivocally expressed*, is it due process of law to condemn and punish him for such felony.

2. That the plea was not responsive to the charge made in the information is manifest from the language used.

3. That the so-called plea, as a pleading to the information, was void, is self evident.

a. Had an issue been joined on the charges in the information, and a jury had brought in a special verdict in the language of the plea, *would it have found the appellant guilty of the felony charged, and would it have been sufficient to justify the judgment rendered in the case?*

1 Derkala 363 supra

b. Or, had an issue been joined on said information would the admission, made by the appellant in said plea, have been sufficient evidence to go to the jury even, as the sole evidence against the respondent? Would it not on such a showing have been the duty of the Court to direct a verdict of not guilty? Evidence of the commission of one crime will not establish the guilt of another. The proof of the commission of an assault and battery made would not be sufficient to establish the commission of a

murder. The proof of petit larceny, merely, would not convict of grand larceny. The proof of a misdemeanor would not be sufficient to convict of a felony, though the offenses might have some features in common.

c. Is the admission of this misdemeanor, sufficient to make out due process of law and to convict and punish appellant for this felony within the meaning of the fourteenth amendment? Did the State court proceed "according to the rules and forms which have been established for the protection of private rights?"

d. The plea *neither confessed the felony charged, nor formed an issue on the information.*

e. In law the appellant on arraignment stood mute. Blackstone says, "Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either 1st, makes no answer at all; or, 2d, answers foreign to the purpose, or with such matter as is not allowable and will not answer otherwise; or, 3d, upon having pleaded not guilty refuses to put himself upon the country."

4 Blackstone's Com. 324.

f. In such case section 9515 of the statute above quoted required the Court to enter a plea of not guilty, as we have seen. The same proceeding is required in the United States courts.

Revised Statutes of the United States, Sec. 1032.

g. The said plea not being a responsive pleading to the issues tendered in the information, was mere surplusage, and could have been stricken out and entirely disregarded as a plea in the case. It is of no consequence in the case only so far as it shows the appellant's intent, whether it was an admission to an offense under Sec. 9152 or not.

VI.

The Circuit Courts of the United States have jurisdiction upon Habeas Corpus to discharge a prisoner held in custody within their respective jurisdictions by virtue of criminal process from State courts whenever such person is imprisoned in violation of the constitution of the United States.

Revised Statutes of U. S., sections 751 and 753.
117 U. S., 249, Ex Parte Royal.
135 U. S., 1, In Re Neagle.
134 U. S., 372, In Re Long.
134 U. S., 160, Medly, Petitioner.
100 U. S., 376, Ex Parte Seabold.

1. Application was made to the Circuit Court in this case pursuant to the practice indicated by this Court in a recent case.

119 U. S., 584, Ex Parte Merzan.

VII.

The complete record of appellant's conviction is before this Court. The only authority for the imprisonment of appellant in the hands of the Warden of the State prison is a certified copy of the said judgment set forth at page 10 of the record, which under the statutes of Michigan is his warrant of commitment. The provisions for removal and imprisonment of convicts are as follows:

§ 9724. "It shall be the duty of the Sheriff of every county in which any criminal shall be sentenced to confinement in the State prison, as soon as may be practicable after the passing of such sentence, to convey such convict to the State prison and deliver him to the Warden thereof."

§ 9725. "When any convict shall be delivered to the Warden of the State prison, the officer having such convict in his charge shall deliver to such Warden the certified copy of the sentence received by such officer from the Clerk of the Court, and shall take from such Warden a certificate of the delivery of such convict; and such certified copy of the sentence of any convict shall be evidence of the facts therein contained."

2 Howell's Annotated Statutes of Mich., page 2334, Sections 9724 and 9725.

The warrant of removal, the sheriff's return thereto and the Warden's receipt of the petitioner appear on page 11 and 12 of the record.

The only return to a writ of Habeas Corpus that the Warden of a State prison can make is that the appellant is detained by virtue of a judgment of conviction and sentence, a copy of which appears at page 10 of the record.

a. Cannot this Court upon this record order the immediate discharge of appellant.

b. A writ of error from this Court having been denied, the Petitioner has no remedy as an absolute right except Habeas Corpus.

43 Federal Rep., 243, In Re Christiansen.
42 Albany Law Journal, 354, In Re Christiansen.

But it is discretionary, however, for this Court to grant relief on Habeas Corpus, when writ of error would have been the appropriate remedy in cases where the error is apparent and the imprisonment is illegal and unjust and thereby save the person the delay and expense of a writ of error.

100 U. S., 376, Ex Parte Seabold.

c. It is evident from the opinion of the Court below that the Judge was inclined to take our views of the case,

but in deference to the opinion of the Supreme Court of Michigan he denied the writ. Evidently, as a single Judge, he was reluctant to disregard the decision of the highest State court and discharge the petitioner and in deference to such decision, yielded his own opinion, no doubt, in the language of Circuit Judge Sawyer, of the ninth circuit, In Re Christiansen, 43 Federal Rep., 243, "thinking it more seemly that the question between the State and National Courts should be authoritatively settled by the United States Supreme Court on appeal than to bring these subordinate Courts into antagonism."

CONCLUSION.

A judgment of conviction without an information or indictment to inform the accused of the nature of the accusation appearing in the record would be void. A final warrant of commitment in a criminal case without a judgment of conviction appearing in the record would be void. A judgment of conviction in a criminal case without a confession of guilt of the crime charged, or a plea and a verdict of guilty appearing in the record would be void. The accused must be presumed to be innocent until proved to be guilty. In the language of Judge Cooley, "The presumption of innocence is an absolute protection against conviction and punishment, except either, *first*, on confession in open court; or, *second*, on proof which places the guilt beyond any reasonable doubt. Formerly, if a prisoner arraigned for felony stood mute wilfully, or refused to plead on being arraigned, a terrible mode was resorted to for the purpose of compelling him to do so, which might even end in his death, and this because *without plea there could be neither trial nor judgment:* but a more merciful proceed-

ing is substituted, the Court entering a plea of not guilty for a party who, for any reason, fails to plead for himself." (Cooley's Constitutional Limitations, 311.)

The appellant has *not* confessed his guilt of the *felony* charged; no plea to said charge of felony has been entered and no issue has been joined on such charge, wherein the presumption of innocence could be overcome and the appellant's guilt of the felony charged, viz, *"embezzlement as an agent,"* has not been proved beyond all reasonable doubt.

His guilt of the felony charged has not been found by a verdict of a jury, and today appellant *is presumed to be innocent of the felony charged*, this void judgment to the contrary, notwithstanding.

So far as I have found the proceedings of the State courts, in this case, are unprecedented in American jurisprudence. Habeas Corpus is the writ of personal liberty, remedial in its nature, and will be liberally construed to protect personal liberty. The petitioner has sought relief in vain in all the State courts and if this Court denies him relief from this extraordinary and arbitrary conviction he is utterly without remedy. If constitutional immunities and rights can be ignored and disregarded; if law can be manufactured, arbitrarily, after an offense has been committed to punish a particular offender, and if constitutional, statutory and common law safeguards can be disregarded and set at naught by State courts without any relief or rebuke from the Courts of the United States, where shall the citizen seek redress or protection? We ask for a writ of Habeas Corpus and that appellant's constitutional rights shall be granted to him and that he be discharged

from this illegal imprisonment. Such a decision from this Court will have a salutory effect upon the State courts, it will remind them that the constitution and laws of the United States are the supreme law of the land and must be respected, followed, and enforced by them.

Most respectfully submitted.

John C Patterson

Counsel for Appellant.

Clerk Supreme Court U. S.
FILED.
DEC 3 1890
JAMES H. McKENNEY.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1283.

EX PARTE: IN THE MATTER OF EUGENE M. CONVERSE, APPELLANT.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

—PRINTED BY—
TIMES PUBLISHING HOUSE, VASSAR, M

Supreme Court of the United States.

EX PARTE: IN THE MATTER OF EUGENE M. CONVERSE, APPELLANT.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Section 9151, Howell's Statutes of Michigan, is as follows:

"If any officer, agent, clerk or servant of any incorporated company, or of any city, township, incorporated town or village, school district or other public or municipal corporation; or if any clerk, agent or servant of any private person, or of a co-partnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master any money or other property which shall have come to his possession or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny."

The appellant was prosecuted under this section, charged with receiving as agent of Dunning & Hall, and while in their employ, $4,000 of their money and property and "then and there fraudulently and feloniously did embezzle and convert the same to his own use" without the consent of his principals. The information is sufficient in every particular under section 9151. (See Record, page 8)

Section 9152, Howell's Statutes, provides:

"If any attorney at law, solicitor in chancery or other person holding himself out to the public to perform the services usually performed by attorneys or solicitors in the management of causes and the collection of judgments, decrees or other demands, or any register in chancery, clerk of any court of record, sheriff, constable, justice of the peace or any other officer shall collect or receive in such capacity any money belonging to another, and shall neglect or refuse to pay the same to the person entitled thereto within a reasonable time after demand thereof, the person so neglecting or refusing shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding four times the amount so received, or both, at the discretion of the court."

To the information on page 8 of the Record the respondent filed plea as follows:

"As an attorney at law I am guilty of embezzlement of thirty-five hundred ($3,500) dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money."

See page 9 of the Record.

Judge Brown, on page 19 of the Record, states the claim of the petitioner as follows:

"The petitioner claims that as the information was framed under section 9151, for the crime of embezzlement by an agent, and he had pleaded guilty to the offense of withholding money which he had collected as attorney at law, which was only a misdemeanor under section 9152, his sentence was illegal and his imprisonment without due process of law."

An attorney is one set in the turn, state or place of another. The term includes any substitute or agent who is appointed to act for another.

See American and English Enc., page 942.
Weeks on Attorneys, Sec. 28.

Attorneys in fact are agents employed in any business for their principals other than the management of suits.

Story on Agency, Sec's 24 *and* 25.

The petitioner was the agent of Dunning & Hall and received the money as such agent.

If an attorney at law collects money for his client he acts in so doing as his agent as well as his attorney; and in either case if, after making the collection, he appropriates the money to his own use, with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement.

People vs Converse, 74 *Mich.* 478.

"When a respondent was informed against for the embezzlement of money alleged to have been received by him in the course of his employment as agent of

the owners, and pleaded that as an attorney at law he was guilty of embezzlement of a less sum collected and received by him, less his reasonable fees as such attorney for making the collection, such plea amounts to a plea of guilty as charged."

Ibid.

The court says in this case: "It is strongly urged by counsel that the information charges the respondent with embezzling $4,000 while acting in the capacity of agent for the owners, while in fact he confessed himself guilty by his plea of collecting the money as an attorney at law and of refusing to pay it over to the owners, less his fees for collecting. There is no question but that the information charges respondent with the crime of embezzlement. He is a lawyer and knew the meaning of the word 'embezzlement' and I think there can be no doubt but that he understood when he made his plea that he was pleading guilty to the felony charged. That such was the fact seems to have been verified by the private examination required by statute to be made by the circuit judge before sentencing upon a plea of guilty, and which is shown to have been made in this case. To hold otherwise would be an impeachment of the intelligence of both the prisoner and the court. That the respondent collected the money as attorney is of no consequence. If the act of the respondent complained of contained all the elements of embezzlement he was guilty of the crime and was properly convicted."

We call the attention of the court to the opinion of Judge Brown and the cases there cited, on pages 18, 19 and 20 of the Record.

We submit there has been no violation of the constitutional provision and the petition should be denied.

B. W. HUSTON,

ATTORNEY GENERAL.